REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC PETITION 1 OF 2016

KM (Minor suing through Mother and Best-friend SKS)……1ST PETITIONER

IRENE AKINYI ODHIAMBO……2ND PETITIONER

MILLICENT ACHIENG AWAKA……3RD PETITIONER

ELIZABETH FRANCISCA MWAILU……4TH PETITIONER

ELIAS OCHIENG'……5TH PETITIONER

JACKSON OSEYA……6TH PETITIONER

HAMISI MWAMERO……7TH PETITIONER

DANIEL OCHIENG OGOLA……8TH PETITIONER

MARGARET AKINYI……9TH PETITIONER

CENTER FOR JUSTICE GOVERNANCE AND ENVIRONMENTAL ACTION (suing on their own behalf and on behalf of all the residents of Owino-Uhuru Village in Mikindani, Changamwe, Mombasa)……10TH PETITIONER

VERSUS

THE HONOURABLE ATTORNEY GENERAL……1ST RESPONDENT

THE CS, MINISTRY OF ENVIRONMENT, WATER AND NATURAL RESOURCES……2ND RESPONDENT

THE CS, MINISTRY OF HEALTH……3RD RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY……4TH RESPONDENT

THE COUNTY GOVERNMENT OF MOMBASA……5TH RESPONDENT

THE EXPORT PROCESSING ZONES AUTHORITY.....6TH RESPONDENT
METAL REFINERY (EPZ)LIMITED.....7TH RESPONDENT
PENGUIN PAPER AND BOOK COMPANY.....8TH RESPONDENT

RULING

A. INTRODUCTION

1. This case concerns the environmental impact of a lead-acid battery recycling factory operated by Metal Refinery (EPZ) Limited in Owino-Uhuru Village, Mombasa County. The residents alleged that toxic waste from the factory had led to severe health problems, including lead poisoning and multiple deaths. This court vide a Judgement dated 16.07.2020 found that NEMA, along with other state agencies had failed to uphold environmental protection leading to the factory's continued operation despite clear environmental harm. The court awarded damages amounting to Kshs. 1.3 billion for loss of life and personal injury and Kshs. 700 million for environmental restoration. The Court of Appeal later reviewed the case, modifying the allocation of liability and revising the award of damages.
2. The matter was further escalated to the Supreme Court which examined whether NEMA had the legal authority to permit

"test runs" and whether the Court of Appeal correctly assessed liability and damages. The Supreme Court on 06.12.2024 upheld the Court of Appeal's determination on Liability but set aside the award of damages. The court further remitted the matter back to this court to deal with the question of compliance with the environmental restoration orders. In its judgement the Supreme Court held, *inter alia,* that;

> *"The Summary of our findings is that we uphold the Court of Appeal's determination on Liability. We however set aside its determination on the award of damages for loss of life and personal injury, and in return reinstate the award issued by the ELC Court. We also set aside the Court of Appeal's determination on restorative damages and reinstate the sum of Kshs. 700 million issued by the ELC Court, being an award to be issued to 11th appellant to restore the environment in the event the 1st appellant and the respondents herein fail to abide by the ELC Court's directions. We however remit the matter back to the ELC and direct it to take into account any restorative measures undertaken and issue further directions thereafter."*

3. The 10th petitioner herein brought an application dated 04.04.2025 seeking, *inter alia,* a declaration that the respondents and in particular the 4th respondent (NEMA) has

failed to carry out any restorative measures within Owino Uhuru village within the time allocated by the court, and for the court to order the respondents pay the 10th petitioner Kshs 700 million to carry out such restorative and remedial measures.

4. When the application came up for directions on 19.06.2025, the court directed parties to file responses and submissions and fixed 23.10.2025 as the ruling date. Before the said ruling date, however, the 4th respondent brought the instant application dated 22.09.2025 seeking, *inter alia,* the arrest of the said ruling and a review of the environmental restoration orders. _

B. 4TH RESPONDENT'S APPLICATION

5. By a notice of motion dated 22.09.2025 brought under *Articles 42, 70 and 162 (2)(b) of the Constitution of Kenya, Section 3 of the Environment and Land Court Act, Sections 1A, 1B & 3A of the Civil Procedure Act and other enabling provisions of the law,* the 4th respondents sought, *inter alia,* the following orders;

    a. *Spent.*
    b. *That pending the hearing and determination of this Application, the Honourable Court be pleased to*

'arrest' or suspend delivery of its ruling scheduled for delivery on 23'° October 2025.

c. *That this Honourable Court do take into consideration the new, refreshing and compelling evidence that the erstwhile declared polluted environment in Owino Uhuru (Suitland) has naturally remediated and declare the absence of significant lead contamination in soil and water.*
d. *That the Award for the release of Kshs. 700,000,000 for environmental restoration be reconsidered and reviewed in the circumstances, as there is no contamination to remediate.*
e. *That the costs of this Application be provided for.*

6. The application was based on the grounds set out on the face of the application and the contents of the supporting affidavit sworn by Dr. Mamo B. Mamo, the Director General of NEMA. It was contended that on 15.04.2025 NEMA collected soil and water samples from the nucleus of the 2016 pollution in Owino Uhuru where the lead smelting plant was situated. He deposed that the said samples were submitted to Kenya Plant Health Inspection Services for detailed analysis, which reported that there were no significant lead levels in the soil and water samples.

7. It was the 4th respondent's case that it had since reviewed the said laboratory results against the applicable environmental safety standards and satisfied itself that the environment in Owino Uhuru had been naturally restored through the process of natural attenuation. It was argued that the contamination detected in 2016 had dissipated with time hence there was no environmental hazard that would require active remediation. The court was urged to find that the expenditure of Kshs 700 million for environmental restoration would serve no purpose and would amount to unjustified and wasteful depletion of public funds.

C. 10th PETITIONER'S RESPONSE

8. The 10th petitioner filed a replying affidavit and a supplementary replying affidavit dated 06.10.2025 and 22.10.2025, respectively, sworn by Phyllis Omido, its Executive Director. It was contended that the application was res judicata for canvassing issues that were determined by the Court of Appeal and the Supreme Court. Further, it was contended that this court lacked jurisdiction to review the operative judgment of the Supreme Court. It was argued that the court had only limited jurisdiction donated by the Supreme

Court to determine whether the respondents had carried out any remediation of the environment and direct payment of the remediation funds. It was argued that this court does not have the jurisdiction to reopen the settled findings of the Supreme Court.

9. In addition, it was contended that the petitioners were never informed of the decision by NEMA to conduct soil and water testing in the village, and were never made parties to the process by which the samples were collected, stored, and ferried to the government agency that tested them. It was maintained that lead is a heavy metal and chemical element that does not decompose, biodegrade or naturally disappear over time. It was contended that once emitted into the environment, it remains there indefinitely unless it's physically removed through deliberate remediation activities.

10. It was the 10th petitioner's case that their own study dated 07.10.2025 has confirmed that there were still pollutants in the soil and water at the village. In particular, the lead levels within the village were still higher than the international standards since Kenya does not have its own standards of permissible environmental lead. The petitioner urged the

court to find that these findings contradict and question the veracity of the KEPHIS report relied upon by the 4th respondent.

D. DIRECTIONS ON SUBMISSIONS

11. When the application was listed for *inter-partes* hearing, it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows none of the parties had filed submissions at the time of preparing this ruling.

E. ISSUES FOR DETERMINATION

12. The court has perused the application, the response thereto and the material on record. The court is of the view that the following key issues arise for determination herein:

    a. *Whether the 4th respondent has made a case for review of the award of Kshs 700,000,000/= for environmental restoration*
    b. *Who shall bear the costs of the application*

F. ANALYSIS AND DETERMINATION

a. *Whether the 4th respondent has made a case for review of the award of Kshs 700,000,000/= made to the 10th petitioner.*

13. This court in its judgment dated 16.07.2020 directed that Kshs 700,000,000/- be channeled to the 10th petitioner to undertake the soil contamination clean-up. The court held;

> *"The court further directs the named liable respondents to within 4 months (120 days) from date of this judgment to clean-up the soil, water and remove any wastes deposited within the settlement by the 7th respondent. In default, the sum of Kshs.700,000,000 comes due and payable to the 10th petitioner to coordinate the soil/environmental clean-up exercise."*

14. Being dissatisfied with the decision, the National Environment Management Authority (NEMA) and Export Processing Zones Authority (EPZA) appealed against the judgement in *National Environment Management Authority & another v KM (Minor suing through Mother and Best friend SKS) & 17 others [2023] KECA 775 (KLR).* In particular, they challenged the award of Kshs 700 million, claiming that the court failed to apply any scientific or statistical formula in arriving at the sum as the appropriate figure for clean up

exercise. The Court of Appeal allowed the appeal and found that the award of Kshs 700 million had not been specifically pleaded or proved and that the restoration of contaminated land is a very technical exercise. The court further found that the petitioners (herein) had not demonstrated scientific methodologies and techniques to be applied to justify the order and award.

15. The petitioners (herein) together with EPZA were dissatisfied with the said judgment and appealed to the Supreme Court in *Export Processing Zone Authority & 10 others (Suing on their own behalf and on behalf of all residents of Owino-Uhuru Village in Mikindani, Changamwe Area, Mombasa) v National Environment Management Authority & 3 others [2024] KESC 75 (KLR).* The Supreme Court set aside the Court of Appeal's determination on restorative damages and reinstated the sum of Kshs. 700 million awarded by this court to the 10th petitioner herein to restore the environment in the event the respondents herein failed to do the cleanup. In particular, the Supreme Court held;

"We therefore find that the Court of Appeal erred in dismissing the restorative orders issued by the ELC and the award of Kshs 700 million in default. We are however alive to the fact that considerable time has passed since the orders of the ELC were issued. Within that frame time the 1st appellant and the respondents may have taken restorative measures which ought to have been accounted for before the default clause comes into place. We therefore find it fit to direct the respondents to file at the ELC in Mombasa, their respective reports, if any, within three (3) months of this decision, on the various restorative measures they have undertaken in line with the judgement of the ELC and the directions issued by the Court of Appeal or on their own initiative. The default clause should thereafter take effect if no restorative measures have been undertaken by the 1st appellant and the respondents. The ELC court will ascertain whether there is need for further directions to restore the damage caused based on the reports filed."

16. The Supreme Court dealt with this instant suit to its finality and remitted it back to this court for further directions as far as restorative measures were concerned. The 4th respondent herein is seeking the review of the award of Kshs 700 million on the ground that there is new evidence demonstrating that there has been natural remediation of the lead pollution. The

10th petitioner has opposed the application and has argued that the court's residual jurisdiction is limited only to execution and not to reopening the judgment of the Supreme Court.

17. The issue of the award of Kshs 700 million has been litigated to its finality from this court all the way to the Supreme court which reinstated the said award. This court has no jurisdiction to reopen the case that has decided by the Supreme Court with a view to reviewing it except for the purpose of receiving evidence on the remedial or restorative measures taken by NEMA. This court's jurisdiction is limited to dealing with the issue of compliance with the restoration orders.

18. It is apparent from the material on record that the 4th respondent's soil samples were collected in April 2025 whereas the petitioners collected theirs in October 2025. It would appear that the 4th respondent did not involve the petitioners in the process of collecting the samples and submitting them for testing. The petitioners' test results done much later still show the existence of environmental contamination hence the court is not satisfied that the 4th

respondent has credibly demonstrated that natural remediation has taken place to warrant a review or setting aside of the award of Kshs 700 million for environmental restoration. The court has taken note of the NEMA report dated 24.03.2025 in which it claimed that it was behind schedule in undertaking the environmental remediation exercise due to a shortage of financial resources and alleged negative media campaigns. In a replying affidavit sworn on 19.05.2025 NEMA claimed that the 10th petitioner had frustrated its efforts in complying with the restoration order by inciting hostility on the ground against it and other government agencies.

b. *Who shall bear the costs of the application*

19. Although the costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap 21).** A successful party should ordinarily be awarded the costs of an action unless the court, for good reason, directs otherwise. However this is a constitutional petition of a public interest nature, and its only

just for the court to direct parties to bear their own costs of the application.

G. CONCLUSION AND DISPOSAL ORDER

20. The upshot of the foregoing is that the court is that the 4th respondent's application dated 22.09.2025 is unmerited. As a consequence, the court makes the following order for disposal thereof:

    a. ***The notice of motion dated 22.09.2025 is dismissed with no order as to costs.***

Ruling dated and **signed** at **Mombasa** and **delivered** virtually via Microsoft Teams on this 5th day of March 2026.

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Y. M. ANGIMA

JUDGE

In the presence of:
Nechesah - Court assistant
Mr. Charles Onyango with Mr. Odongo for the petitioners
N/A for the AG for the 1st, 2nd and 3rd respondents
Ms. Ganya for the 4th respondent
Ms. Kinuva for the 5th respondent
Ms. Ashitiva for the 6th respondent
N/A for the 7th respondent
N/A for the 8th respondent